

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERARD MORRISON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:14cv-00005 (CMH/JFA)
)	
COUNTY OF FAIRFAX, VIRGINIA,)	
)	
Defendant.)	
)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ON LIABILITY ISSUES

Defendant County of Fairfax, Virginia (the “County”), by counsel and pursuant to Federal Rule of Civil Procedure 56, respectfully moves the Court to enter summary judgment in favor of the County on all Counts of the Second Amended Complaint asserted by the 21 Discovery Plaintiffs, namely Oscar Beasley Jr.; Bill Betz; Fred Brandell, Jr; Bradford Cochrane, Jr.; David Conrad; Charles Cunningham; Michael Davis; Jared Goff; George Gonzalez Jr; John Higginbotham; Anthony L. Jackson; Reginald T. Johnson; William R. Kingdon; David G. Lange; Mark P. Menton; Donald P. Montague; Gerard J. Morrison, Natalie D. Robb; William D. Vannoy; Christopher Thompson; and John L. Walser (collectively, the “21 Captains”).

The undisputed material facts establish that all 21 Captains, while assigned to the positions of Fire Captain I Shift Commander (“Shift Commander”), Fire Captain II Station Commander (“Station Commander”), Fire Captain I Safety Officer (“Safety Officer”), and Fire Captain II EMS Supervisor (“EMS Supervisor”) in the County’s Fire and Rescue Department (the “FRD”) were exempt from the overtime provisions of the Fair Labor Standards Act (the “FLSA”).

The Court should grant summary judgment on Counts I and III, which seek time-and-a-half overtime pay for all hours worked in excess of 40 hours in a week. Section 207(k) of the FLSA allows a public agency to adopt a work period of between 7 and 28 days for fire protection and emergency personnel. The undisputed facts establish that, while assigned to one of the four positions at issue, the 21 Captains were employed by a public agency and engaged in “fire protection activities,” and that the County has established a 28-day work period for them. The FLSA’s 40-hour overtime threshold, therefore, does not apply to them.

The County is also entitled to summary judgment all Counts of the Second Amended Complaint because the 21 Captains are fully exempt from the FLSA’s overtime provisions, for two reasons. First, the 21 Captains are “highly compensated employees” as defined by the Department of Labor because (i) their compensation exceeds \$100,000 per year; (ii) their primary duties include office or non-manual work; and (iii) they customarily and regularly perform at least one of the duties prescribed in the separate regulations that define exempt executive and exempt administrative employees. Second, without regard to their compensation, all Captains also are either “executive” or “administrative” employees because they satisfy one or the other of the separate multi-part tests in the applicable DOL regulations.

The Shift and Station Commanders are the highest-ranking officers in command of their assigned fire stations throughout their 24-hour shifts. Some are the only officers in their stations. They all supervise a shift of personnel that ranges from six to 18 subordinates. While they do respond to fire and rescue calls, that activity consumes only a small fraction of their time and energy. Instead, nearly all of what they do on a day-to-day basis is for the purpose of ensuring the operational readiness of their subordinates, their station, and their apparatuses. That job is important, challenging, and multi-faceted. It runs the gamut from inspecting everyone’s personal

gear and equipment; to supervising and participating in daily physical training; to making sure the fire and rescue vehicles are ready to go when the bell rings; to coaching, mentoring, and evaluating lower ranked personnel; to filling out daily logs and reports; to interacting with higher ranking officers in the FRD; to responding to complaints and inquiries from the public. The Commanders' positions are quintessentially management.

EMS Supervisors and Safety Officers are exempt from the FLSA because they are “administrative” employees whose primary duties are non-manual work related to the overall management and servicing of the FRD and the community it serves and who exercise judgment and discretion in the performance of their jobs. EMS Supervisors are half of the two-member Battalion Management Team that oversees each battalion, consisting of five or six stations, during each shift. While on duty, they are the subject-matter expert and responsible for overseeing the provision of all emergency medical care in their respective battalion. They review the written records of every emergency medical response in their battalion. They monitor, measure, and evaluate individual and system performance to develop and implement strategies for improving delivery of emergency medical services. They recommend, coordinate, and provide training to personnel at the station and battalion level. They interface with area medical facilities and citizens, and conduct quality assurance investigations, making findings and recommendations for corrective action.

Safety Officers are the FRD's primary contact for matters dealing with employee safety. They investigate all employee injuries, occupational exposures, department vehicle accidents, and citizen complaints regarding property damage. They evaluate preventability and recommend actions to reduce or eliminate risk. They formulate safety training, and issue safety bulletins, alerts, and tips to all field personnel at all ranks. Safety Officers are dispatched on certain

significant incidents and function as part of the incident command team. They can alter, suspend, or terminate any or all activity at an incident that they judge to be unsafe or to involve an imminent hazard; they also advise and act through the incident commander to mitigate or eliminate unsafe conditions that do not present an imminent danger. They participate in post-incident critiques and analyses, offering recommendations, guidance, and training suggestions.

The 21 Captains would have the Court extend the reach of the FLSA into new and uncharted territory, far beyond the boundaries that are well-established and recognized by the Fourth Circuit and elsewhere. They will argue that a 2004 DOL regulation that applies to “first responders” trumps the “highly compensated employee” rule as it applies to fire protection personnel, never mind that the two regulations were enacted at the same time and the DOL expressly did not make them mutually exclusive. They will also argue that because they respond to emergency calls along with their subordinates and, when appropriate, handle hoses and ladders and administer first-aid, they are, in effect, no different than entry level firefighters and EMTs. But even when responding to calls, the 21 Captains always retain their authority and responsibility for the firefighters and EMTs under their command. Moreover, under their interpretation of the first responder regulation, no uniformed fire protection employee—including the Fire Chief himself—could ever be exempt from the FLSA. That is plainly wrong.

For these reasons which are more fully set forth in the accompanying Memorandum of Law, the County asks that the Court grant its Motion for Summary Judgment.

Respectfully submitted,

COUNTY OF FAIRFAX, VIRGINIA

By: _____/s/
Sona Rewari (VSB No. 47327)
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive ,Suite 1700
McLean, Virginia 22102
(703) 714-7512
(703) 918-4018 (facsimile)
srewari@hunton.com

Lewis F. Powell III (VSB No. 18266)
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Telephone: 804-788-8488
lpowell@hunton.com

Evangeline C. Paschal (*pro hac vice*)
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 419-2174
(202) 778-7433 (facsimile)
epaschal@hunton.com

Cynthia L. Tianti, Deputy County Attorney (VSB No. 21962)
Ann G. Killalea, Assistant County Attorney (VSB No. 23913)
David Klass, Assistant County Attorney (VSB No. 78697)
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035
(703) 324-2421
(703) 324-2665 (facsimile)
cynthia.tianti@fairfaxcounty.gov
ann.killalea@fairfaxcounty.gov
david.klass@fairfaxcounty.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/

Sona Rewari (VSB No. 47327)
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
(703) 714-7512
(703) 918-4018 (facsimile)
srewari@hunton.com